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No. 09-901

In the Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's decision to restore certain Long Island communities served by Cablevision Systems Corporation to the market of television station WRNN, thereby entitling the station to carriage on Cablevision's cable systems in those communities, was consistent with the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. 534, and the Constitution.

2. Whether this Court's decisions in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994), and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997), which upheld the must-carry requirement in 47 U.S.C. 534 against a facial First Amendment challenge, should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 570 F.3d 83. The order of the Federal Communications Commission (FCC or Commission) (Pet. App. 47a-68a) is reported at 22 F.C.C.R. 21,054. The order of the FCC's Media Bureau (Pet. App. 27a-46a) is reported at 21 F.C.C.R. 5952.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2009. A petition for rehearing was denied on October 29, 2009 (Pet. App. 70a-71a). The petition for a writ of certiorari was filed on January 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, 106 Stat. 1460, requires a cable system with more than 300 subscribers to "carry * * * the signals of local commercial television stations" that operate "within the same television market as the cable system." 47 U.S.C. 534(a) and (h)(1)(A). "Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 632 (1994) (*Turner I*). Congress found that there was "a substantial likelihood that [without a must-carry requirement,] additional local broadcast signals will be deleted, repositioned, or not carried," and that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* at 634 (quoting 1992 Cable Act § 2(a)(15) and (16), 106 Stat. 1462).

In *Turner I* and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*), this Court upheld the must-carry requirement against a facial First Amendment challenge. In *Turner I*, the Court held that the must-carry requirement was content-neutral and subject to intermediate scrutiny. See 512 U.S. at 661-662. In *Turner II*, the Court applied that standard and held that the statute was constitutional because it was narrowly tailored to advance the government's important interests in "preserving the benefits of free, over-the-air local broadcast television" and "promoting the widespread dissemination of information from a multiplicity of sources." 520 U.S. at 189.

2. Under 47 U.S.C. 534(h)(1)(C)(i), a broadcast television station is entitled to carriage on cable systems located within the station's market, as defined by "commercial publications which delineate television markets based on viewing patterns." To determine a television station's market for purposes of this provision, the Commission "relies on the commercial publications of Nielsen Market Research that divide the nation into a series of coterminous geographic 'Designated Market Areas' ('DMAs') based on viewership patterns." Pet. App. 3a (citing 47 C.F.R. 76.55(e)(2)). If a television station and a cable system are located in the same DMA, then the cable system is presumptively required to carry the station's broadcast signal.

The must-carry statute authorizes the Commission to adjust a television station's market—and therefore the geographic extent of its must-carry rights—upon written request. 47 U.S.C. 534(h)(1)(C). The Commission may "include additional communities within [a station's] television market or exclude communities from such station's television market to better effectuate the purposes" of the statute. 47 U.S.C. 534(h)(1)(C)(i). In exercising this market-modification authority, the Commission is required to

> tak[e] into account such factors as—(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; (II) whether the television station provides coverage or other local service to such community; (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides

> carriage or coverage of sporting and other events of interest to the community; and (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

47 U.S.C. 534(h)(1)(C)(ii).

3. WRNN is a television station licensed to Kingston, New York, a community within the New York DMA. See Pet. App. 7a. Petitioner operates cable systems on Long Island that also lie within the New York DMA. *Ibid.* Because of this overlap, WRNN is presumptively entitled to carriage on petitioner's Long Island systems under Section 534(h)(1)(C)(i).

In 1997, the Commission (at petitioner's request) exercised its market-modification authority to exclude communities on Long Island from WRNN's television market. See *Market Modifications & the N.Y. Area of Dominant Influence*, 12 F.C.C.R. 12,262 (1997). In doing so, the Commission emphasized that those Long Island communities could not at that time receive a sufficiently strong signal from WRNN to be considered part of the station's geographic market. See *id.* at 12,271-12,272 (¶ 19). The Second Circuit affirmed the FCC's order. See *WLNY-TV, Inc.* v. *FCC*, 163 F.3d 137 (1998).

By 2006, WRNN had switched to all-digital operations and had relocated its transmitter closer to Manhattan, allowing it to broadcast a stronger signal to Long Island. Pet. App. 8a-9a. Based on its stronger signal and other factors, WRNN asked the Commission to restore Long Island to its television market. *Id.* at 9a. In May 2006, the Commission's Media Bureau granted WRNN's request to restore communities in Nassau County and western Suffolk County to its geographic market, *id.* at 27a-46a, while rejecting the sta-

tion's request with respect to "geographically distant" communities further out on Long Island that were not adequately served by the station's over-the-air signal, *id.* at 36a-37a. On internal agency review, the Commission upheld the Bureau's decision. *Id.* at 47a-60a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-26a. The court found "no constitutional or legal error in the FCC's decision." *Id.* at 3a. The court held that the Commission had reasonably applied the factors set forth in 47 U.S.C. 534(h)(1)(C)(ii) in modifying WRNN's television market. See Pet. App. 11a-16a. The court rejected petitioner's argument that the Commission had violated the market-modification provision by failing to account for the goal of "localism" or the "purposes" of the must-carry regime. *Id.* at 17a-19a. The court concluded that restoring the Long Island communities to WRNN's television market would not necessarily reduce the local programming targeted to Kingston, *id.* at 17a, and that the agency's action did not violate the statute, given that "the default rule is that WRNN must be carried by cable operators throughout the New York City DMA." *Id.* at 18a.

The court of appeals rejected petitioner's "as-applied" First Amendment challenge to the market-modification order. Pet. App. 19a. The court held that the Commission's order was content-neutral, and it had "no trouble in concluding that the order 'advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests.'" *Id.* at 22a-24a (quoting *Turner II*, 520 U.S. at 189). The court further held that the market-modification order did not result in a per se taking of petitioner's property, and it noted that petitioner had

not offered any evidence to support its claim that a regulatory taking had occurred. See *id.* at 25a-26a.

ARGUMENT

The Commission reasonably analyzed the pertinent factors under Section 534(h)(1)(C) in exercising its market-modification authority in this case, and it did so in a manner consistent with the First Amendment. The court of appeals' decision upholding the Commission's fact-specific analysis of WRNN's relationship to the Long Island communities served by petitioner does not conflict with the decision of any other court or present a question of importance warranting this Court's consideration. Although petitioner attempts to supplement its fact-bound challenges to the agency's market-specific decision by launching a facial attack on the entire must-carry regime, that broader claim is jurisdictionally barred, waived, and unsupported by the thin record in this case.

1. Petitioner contends that the Commission's decision is not "consistent with the must-carry statute." Pet. 32. That fact-bound claim, which was correctly rejected by the court of appeals, does not warrant this Court's review.

Section 534(h)(1)(C) authorizes the Commission to modify television markets to "better effectuate the purposes of" Section 534. In deciding whether to modify a television station's market, the Commission must "afford particular attention to the value of localism by taking into account such factors as" (1) whether television stations in the same area have historically been carried on the relevant cable systems, (2) whether the television station at issue "provides coverage or other local service to such community," (3) whether other television stations provide news or other coverage of local interest,

and (4) "evidence of viewing patterns" within the community. 47 U.S.C. 534(h)(1)(C)(ii).

In this case, the Commission balanced the statutory factors and concluded that petitioner's Long Island communities should be restored to WRNN's presumptive market. See Pet. App. 39a-45a (Bureau decision); *id.* at 51a-53a (Commission decision). The Bureau emphasized the strong signal that WRNN now places over Long Island. See *id.* at 44a. The Commission noted as well WRNN's "substantial record" of Long Island programming and the fact that WRNN had begun to be carried by petitioner's competitors on Long Island. *Id.* at 52a. When evaluating a market-modification request, the agency is merely required to "consider a number of factors"; the statute does not dictate how much (if any) weight each factor must receive. *Id.* at 15a-16a (citing *Time Warner Entm't Co.* v. *FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995), cert. denied, 516 U.S. 1112 (1996)). The court of appeals correctly found that the Commission had discharged its duty to consider the relevant criteria (*id.* at 16a) and that its decision was supported by "substantial evidence" in the record (*id.* at 13a).

Petitioner contends that the Commission's market-modification order "will do nothing to further the value of localism" on Long Island and will give WRNN "an incentive to neglect its Kingston audience." Pet. 32-33. As the court of appeals observed, however, this contention rests on a "false premise." Pet. App. 17a. Not only was there "substantial evidence" in the agency record to support the Commission's conclusion that WRNN aired "significant Long Island-targeted programming" (*id.* at 12a-13a), but WRNN can adjust its non-local programming so as to "increase Long Island-targeted program-

ming without decreasing Kingston-targeted programming," *id.* at 17a.

Petitioner argues that the market-modification order does not "better effectuate" the purposes of must-carry because, in petitioner's view, the order made WRNN "better off" by permitting the station to be carried in communities "many * * * miles away from its traditional over-the-air service area." Pet. 33-34. WRNN's presumptive market, however, is defined by the 1992 Cable Act, which specifies that a station's market is determined in the first instance by "commercial publications which delineate television markets based on viewing patterns." 47 U.S.C. 534(h)(1)(C)(i). In this case, because WRNN's community of license and petitioner's Long Island communities are within the same DMA, "the default rule is that WRNN must be carried by cable operators throughout the New York City DMA." Pet. App. 18a. Contrary to petitioner's suggestion, the Commission's order therefore did not confer a special benefit on WRNN, but simply restored part of its default market under the must-carry statute.

Moreover, as the court of appeals concluded, the purposes of Section 534 include "'preserv[ing] the benefits of free, over-the-air television' and 'promot[ing] the widespread dissemination of information from a multiplicity of sources.'" Pet. App. 19a (quoting *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 662 (1994) (*Turner I*)). Those purposes are not "served only by granting broadcasters the minimum must-carry coverage necessary for survival," nor are they "frustrated by actions which result in a station's greater prosperity." *Ibid.*

2. Petitioner contends that the Court's reasoning in *Turner I* and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*) cannot support "com-

pelled carriage of WRNN here." Pet. 25. Because the court of appeals' rejection of that as-applied constitutional challenge turned on the particular facts and circumstances of this case and does not conflict with the decision of any other court, further review of this claim is not warranted. In any event, petitioner's as-applied challenge lacks merit.

a. Petitioner's as-applied challenge fails at the threshold because it misapprehends the proper First Amendment inquiry. When intermediate scrutiny applies (as it does here, see *Turner I*, 512 U.S. at 662), a party cannot establish a First Amendment violation simply by demonstrating that "allowing an exception in [its] particular case will not threaten important government interests." *United States* v. *Albertini*, 472 U.S. 675, 688 (1985), see *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984). Such case-specific showings do not warrant "as applied" relief for the parties advancing them; statutes subject to intermediate scrutiny "must be evaluated in terms of their general effect." *Albertini*, 472 U.S. at 689; see *A-R Cable Servs.-ME, Inc.* v. *FCC*, Civ. No. 95-134-P-H, 1995 WL 283861, at *4 (D. Me. May 10, 1995) ("The [must-carry] statute's constitutionality must be assessed—as is happening in *Turner Broadcasting*—according to the general information available to support the legislative judgment.").

Even if the kind of party-specific First Amendment challenge petitioner asserts were permissible, it would fail. Petitioner first argues that application of must-carry requirements here is inconsistent with *Turner* because WRNN has "*no* over-the-air audience" and "[t]here is no important governmental interest in saving a broadcast signal for an over-the-air audience that does

not exist." Pet. 25-26. Contrary to that contention, however, the record shows that WRNN's digital signal reaches the Long Island communities at issue (Pet. App. 41a-42a); that the station has an audience in those communities, (*id.* at 45a); and that the station airs programming directed to Long Island residents (*id.* at 42a-44a, 52a) and receives numerous telephone calls from viewers in that region (*id.* at 45a). In addition, this Court in *Turner II*, rejected "a minimum viewership standard" for must-carry eligibility as a reasonable alternative and deferred to the "deliberate congressional choice to adopt the present levels of protection." 520 U.S. at 218-219.

As the Commission found, moreover, the market-modification order ensures that WRNN "(1) remains a viable option for viewers who rely on free, over-the-air television service in Nassau and Suffolk counties, and (2) continues to number among the multiplicity of information sources available to viewers in those counties." Pet. App. 55a. The governmental interests implicated in this case are the same interests this Court has identified as sufficient to support the imposition of must-carry obligations on cable operators. See *Turner II*, 520 U.S. at 189-190; *Turner I*, 512 U.S. at 662-663.

Petitioner is also incorrect in arguing that the market-modification order at issue here violated the First Amendment by improperly "extend[ing] WRNN's reach." Pet. 27. On the contrary, the order merely restores a portion of the New York DMA (WRNN's presumptive television market) to the station's geographic market based on record evidence that WRNN now provides signal coverage and local service to the Long Island communities. See Pet. App. 11a-16a.

Petitioner also contends that this Court's rationale for upholding the must-carry regime forbids compelled

carriage of WRNN except where necessary to prevent financial "hardship" to the station. Pet. 27. That is incorrect. The Court in *Turner II* did not require the government to make "a showing that financial hardship will befall the particular station" seeking carriage rights in the absence of must-carry. *Ibid.* Rather, the Court found it sufficient that Congress had "substantial evidence to support its conclusion" that "the viability of a broadcast station depends to a material extent on its ability to secure cable carriage." *Turner II*, 520 U.S. at 208.

Petitioner does not dispute that cable carriage remains critical to broadcast stations' financial viability generally. It argues instead that the market-modification order in this case is unconstitutional because, in petitioner's view, carriage on petitioner's Long Island systems is not necessary to keep WRNN in business. Because petitioner did not raise that argument before the Commission, its challenge to the market-modification order on that basis is barred by 47 U.S.C. 405(a), which provides that a petition for agency reconsideration is a "condition precedent to judicial review" of any "question[] of fact or law" upon which the Commission "has been afforded no opportunity to pass." See, *e.g.*, *In re Core Commc'ns, Inc.*, 455 F.3d 267, 276 (D.C. Cir. 2006) (Courts "generally lack jurisdiction to review arguments that have not first been presented to the Commission.") (citation omitted).

In any event, even if petitioner had raised that argument before the Commission, the agency reasonably could have rejected it. In *Turner I*, this Court identified as important governmental interests the "preserv[ation] [of] the benefits of free, over-the-air local broadcast television" and the "promot[ion] [of] the widespread dissem-

ination of information from a multiplicity of sources." 512 U.S. at 662. Given those recognized interests, the First Amendment does not require that the statute be read to provide broadcasters only "the minimum must-carry coverage necessary for survival." Pet. App. 19a.

Petitioner is also incorrect in contending (Pet. 27) that must-carry requirements cannot constitutionally be applied unless a cable operator denies carriage to a broadcaster "with a view to stifling competition." To the contrary, the Court in *Turner II* recognized that the government has an important interest in "preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anti-competitive animus or rises to the level of an antitrust violation." 520 U.S. at 194. Indeed, the Court specifically rejected the argument that the government's interest could be adequately served by application of the antitrust laws or an administrative complaint procedure, under which "the station [would have] to prove facts establishing an antitrust violation" rather than "proving entitlement under must-carry." *Id.* at 223. That analysis refutes petitioner's assertion that, with each application of the must-carry statute, "the Government must prove that anticompetitive motives drove the specific carriage judgment that the Government seeks to override." Pet. 28.

Finally, petitioner argues that "*Turner*'s rationale simply ceases to function where a cable operator is subject to competition." Pet. 28. Petitioner asserts that it faces "robust competition from Verizon's fiber-optic cable television service." *Ibid.* The administrative record indicates, however, that at the time of the Commission's market-modification order, Verizon offered television service in only three of the 79 Long Island communities

affected by that order. See Pet. App. 52a n.15. And petitioner did not provide the agency with any Long Island-specific market-share data to substantiate its claim of "robust competition." Thus, to the extent that information concerning competition within a particular market is relevant to the constitutionality of a particular application of the must-carry statute, this case comes to the Court without such evidence.

b. Section 534(h)(1)(C)(ii) provides that "[i]n considering requests [to modify television markets], the Commission shall afford particular attention to the value of localism by taking into account such factors as * * * whether the television station provides coverage or other local service to such community." 47 U.S.C. 534(h)(1)(C)(ii). Petitioner contends that the FCC's consideration of that factor in this case rendered its market-modification order content-based and therefore subject to strict First Amendment scrutiny. Pet. 29-32. Petitioner did not argue before the Commission, however, that consideration of WRNN's programming for the purpose of determining the station's geographic market would trigger strict scrutiny and violate the First Amendment. To the contrary, petitioner urged the Commission to treat WRNN's purported *lack* of Long Island-oriented programming as a ground for denying the station's market-modification request. See Pet. App. 43a. Petitioner's current contention that strict scrutiny applies therefore is not properly before the Court. See 47 U.S.C. 405(a).

Even if petitioner had preserved that argument, this case would present a poor vehicle for considering it. As the court of appeals explained, "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision." Pet. App. 23a. Indeed, the agency's

Media Bureau and the full Commission "reached different conclusions on this factor, yet both agreed that the totality of the circumstances no longer justified excluding Long Island communities from WRNN's presumptive" market. *Ibid.* The Court should not decide whether FCC consideration of the local-programming factor triggers strict scrutiny in a case where that factor was "inconsequential" to the outcome.

In all events, the court of appeals correctly concluded that the Commission's "order is content neutral and deserving of intermediate scrutiny." Pet. App. 23a.[1] "[T]he 'principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys.'" *Turner I*, 512 U.S. at 642 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)) (ellipsis and brackets omitted). The Commission did not consider WRNN's programming to determine whether it agreed or disagreed with the "ideas or views expressed." *Id.* at 643. Rather, as the court of appeals observed, the Long Island communities are part of WRNN's presumptive market, and the Commission "considered the amount of local programming provided by WRNN only * * * in assessing the continued need to restrict [that] presumptive market defined solely by geography." Pet. App. 23a. The statute does not direct

[1] Contrary to petitioner's contention, the court of appeals did not hold that "consideration of content triggers strict scrutiny only when there is an 'illicit content-based motive.'" Pet. 30 (quoting Pet. App. 23a). Rather, the court concluded that such a motive may be an "[a]dditional[]" reason to apply strict scrutiny, but noted that in this case petitioner had "not alleged, much less proven that the restoration of the Long Island communities to WRNN's market under these circumstances was based on some illicit content-based motive." Pet. App. 23a.

consideration of local programming in order to promote it, but rather as one of a number of factors that provide reasonable guideposts to assess the reach of a station's market. See 47 U.S.C. 534(h)(1)(C)(ii).

3. Petitioner also contends that "sweeping industry changes since the 1990s" have undermined the rationale of the *Turner* decisions, and that the Court should therefore overrule those decisions and hold that the must-carry statute is facially invalid. Pet. 16-24. That claim is not properly before the Court, and, even if it were, this case would present a poor vehicle for resolving it.

a. The 1992 Cable Act provides that, "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 * * * shall be heard by a district court of three judges convened pursuant to * * * section 2284 of Title 28." 47 U.S.C. 555(c)(1). Petitioner's petition for review of the Commission's decision is a "civil action" through which petitioner now seeks to "challeng[e] the constitutionality of section 534." *Ibid.* Section 402(a) of the Communications Act of 1934 gave the court of appeals jurisdiction to consider petitioner's case-specific petition for review of the FCC's order, see 47 U.S.C. 402(a); 28 U.S.C. 2342, but 47 U.S.C. 555(c)(1) operates "[n]otwithstanding any other provision of law." Petitioner's general attack on the constitutionality of the must-carry statute is therefore jurisdictionally barred in this case.

Even if that statutory bar did not exist, petitioner's facial challenge to the must-carry provisions would not be properly before the Court because petitioner did not press that challenge below and the court of appeals therefore did not pass on it. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where

issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). As the court of appeals noted, petitioner "presented" it with "neither factual support nor even a theory" of any First Amendment claim other than its fact-specific as-applied challenge. Pet App. 24a.[2]

b. Even if petitioner's facial challenge were properly before the Court, this case would be an unsuitable vehicle for deciding whether changed circumstances have rendered the must-carry provisions unconstitutional. Because petitioner failed either to invoke the three-judge court or to provide the Commission or the court of appeals with meaningful evidence in support of its claim of changed circumstances, the record in this case does not contain the broad range of data that would be needed to evaluate the constitutionality of the must-carry statute under present circumstances. Moreover, as petitioner notes, the constitutionality of the must-carry statute "has broad significance for virtually every cable system and broadcast station in the country." Pet. 16. Until filing its petition for a writ of certiorari, however, petitioner litigated this case as a fact-specific challenge to an adjudicatory order affecting only it and WRNN. Other parties whose interests would be affected by a broad constitutional ruling therefore had no

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[2] Petitioner included one footnote in its court of appeals brief speculating that this Court would not now "reach the same conclusion" as it did in the *Turner* cases "[g]iven the dramatic changes in circumstances." Pet. C.A. Br. 60 n.164. If petitioner intended to preserve its facial attack on the must-carry statute by means of this footnote, that effort failed in light of the Second Circuit's rule that it "do[es] not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *United States* v. *Restrepo*, 986 F.2d 1462, 1463, cert. denied, 510 U.S. 843 (1993).

incentive to seek to protect those interests, or to supplement the evidentiary record, in the proceedings below.

This Court's decision in *Turner II*, which arose from suits filed under Section 555, relied heavily on the comprehensive record developed before the three-judge district court. See 520 U.S. at 187 ("The District Court oversaw another 18 months of factual development on remand 'yielding a record of tens of thousands of pages' of evidence, comprised of materials acquired during Congress' three years of preenactment hearings, as well as additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand.") (citation omitted) (quoting *Turner Broad.* v. *FCC*, 910 F. Supp. 734, 755 (D.D.C. 1995), aff'd, 520 U.S. 180 (1997)). A complete record was especially critical, the Court emphasized, because of the "substantial deference" that courts owe "to the predictive judgments of Congress." *Turner I*, 512 U.S. at 665 (plurality opinion). Any reexamination of the constitutionality of must-carry should similarly proceed upon an evidentiary record that reflects the "importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties [will likely] contend are to be drawn from the statistics and other evidence presented." *Id.* at 668 (plurality opinion).

The thin record in this case is inadequate to serve that purpose. Petitioner and its amici attempt to fill in the evidentiary gap by citation to extra-record evidence, including blog postings (Pet. 20 n.8, Time Warner Br. 18); Wall Street analyst reports (Time Warner Br. 21); and articles from newspapers (Discovery Br. 12), law reviews (Pet. 19 n.7, Time Warner Br. 15 n.5), and trade journals (Pet. 20 n.8). Such material is no substitute for the detailed factual record the Court previously found

necessary to decide the facial constitutionality of the must-carry statute.

c. Petitioner contends that cable television operators now face "vibrant competition" and no longer "possess bottleneck power" in the video distribution market. Pet. 18. With the entry of direct broadcast satellite (DBS) providers (and more recently the local telephone companies) into the multi-channel video distribution market, the cable industry is now subject to greater competition than at the time of this Court's decisions in *Turner I* and *Turner II*. The latest Commission figures show that, as of June 2006, almost 28 million United States households, or approximately 29.2% of all United States video subscribers, subscribed to DBS service. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 547 (2009) (¶ 12) (*Annual Assessment*); see also *id.* at 548 (¶ 14) (describing efforts by telephone companies to expand facilities-based video service).

In *Comcast Corp.* v. *FCC*, 579 F.3d 1 (2009), the D.C. Circuit stated that, in light of this increased competition, "[c]able operators * * * no longer have the bottleneck power over programming that concerned the Congress in 1992." *Id.* at 8; see Pet. 18. In later rejecting petitioner's challenge to another set of regulatory obligations imposed by the 1992 Cable Act, however, the D.C. Circuit observed that "the transformation [since 1992] presents a mixed picture." *Cablevision Sys. Corp.* v. *FCC*, No. 07-1425, 2010 WL 841203, at *7 (Mar. 12, 2010). The court explained:

> While cable no longer controls 95 percent of the [multichannel video programming distributor] market, as it did in 1992, cable still controls two thirds of the market nationally. In designated market areas

> in which a single cable company controls a clustered region, market penetration of competitive [providers] is even lower than nationwide rates.

Ibid.; see *id.* at *2 ("Because of * * * clustering and consolidation, a single geographic area can be highly susceptible to near-monopoly control by a cable company.").

In enacting the must-carry provisions, moreover, Congress was concerned not only with "promoting fair competition in the market for television programming"; it also sought to "preserv[e] the benefits of free, over-the-air local broadcast television," and to "promot[e] the widespread dissemination of information from a multiplicity of sources." *Turner I*, 512 U.S. at 662. The evidence available at that time indicated that "the viability of a broadcast station depends to a material extent on its ability to secure cable carriage," *Turner II*, 520 U.S. at 208, and that cable systems had strong incentives "to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers," *id.* at 200. Nothing in the record of this case suggests that those incentives have dissipated in recent years.

To be sure, as petitioner observes (Pet. 19-20), the percentage of Americans who rely solely on over-the-air broadcast television signals has decreased substantially. See *Annual Assessment*, 24 F.C.C.R. at 549 (¶ 16) (to 14% as of June 2006). Contrary to petitioner's suggestion (Pet. 20-21), however, that reduction does not necessarily diminish the government interests furthered by the must-carry requirements. The decreased number of over-the-air viewers makes carriage on cable systems even more critical to further the congressional interest in ensuring that "a multiplicity of broadcasters" are fi-

nancially able to provide an alternative source of programming to the American public. See *Turner II*, 520 U.S. at 221.

Petitioner's challenge to the 1992 Cable Act's must-carry requirements also takes no account of the technological developments that have greatly lessened the statute's burden on the cable industry. The Court previously upheld the must-carry requirements against the plaintiffs' constitutional challenge at a time when "[m]ore than half of the cable systems in operation" could carry only "between 30 and 53 channels." See *Turner I*, 512 U.S. at 628. As a result of digital compression, cable systems in 2005 had an "average" of at least 226 channels. *Annual Assessment*, 24 F.C.C.R. at 562 (¶ 44); see Time Warner Br. 10 (noting that ten digital channels can be provided using the same bandwidth as one analog channel). Because cable operators have far greater capacity to carry programming now than they had at the time of *Turner II*, the requirement that some channels be devoted to carriage of local broadcast stations is much less burdensome than it was when the must-carry provisions were previously sustained against constitutional attack.[3]

d. Petitioner contends that because of improvements in "A/B switches," which permit viewers to toggle between cable and broadcast antenna inputs, broadcast stations need not "be carried on cable to reach cable subscribers." Pet. 19. That claim was not raised before the agency or the court of appeals and therefore is not prop-

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[3] Petitioner's suggestion (Pet. 25) that carriage of WRNN would require it to "replace" C-SPAN fails to acknowledge petitioner's representation to the court of appeals that C-SPAN could be moved to another analog channel on petitioner's Long Island systems. See C.A. Mot. to Stay the Mandate 19.

erly before this Court. See 47 U.S.C. 405(a); *Yeskey*, 524 U.S. at 212-213.

In any event, this claim lacks merit. In *Turner II*, the Court specifically considered A/B switches as an alternative to must-carry regulation. 520 U.S. at 220. It concluded that the technology suffered from numerous flaws and therefore would not be an adequate alternative to the must-carry requirements. *Id.* at 220-221. In 2007, the Commission revisited the issue and found that "while A/B switches have largely moved from mechanical to electronic" operation, "switching signal sources still remains cumbersome or impossible for television viewers and does not represent an adequate alternative to must-carry." *Carriage of Digital Television Broad. Signals*, 22 F.C.C.R. 21,064, 21,090 (2007) (¶ 53), petition for review dismissed *sub. nom. C-SPAN* v. *FCC*, 545 F.3d 1051 (D.C. Cir. 2008). Because petitioner did not raise the A/B switch as an alternative until its petition for a writ of certiorari, the administrative record in this case contains no evidence to rebut those findings. The absence of any legal or factual basis on which to examine the A/B switch as an alternative to must-carry requirements is an additional reason why this case does not present a suitable occasion for this Court to reexamine the *Turner* decisions.

e. Finally, petitioner complains that stations with must-carry rights are entitled to carriage on a channel "on the most widely distributed—and thus most desirable—tier." Pet. 21. This is not a new market development warranting reconsideration of the Court's decisions in *Turner I* and *Turner II*. When the must-carry requirements were enacted, evidence before Congress indicated that cable operators would have an "increasing ability and incentive," not only "to drop local broadcast

stations from their systems," but to "reposition them to a less-viewed channel." *Turner II*, 520 U.S. at 197. Congress prohibited such practices by granting must-carry stations the right to "be carried on the cable system channel number on which the local commercial television station is broadcast over the air," and by requiring such channels to be "provided to every subscriber of a cable system." See 47 U.S.C. 534(b)(6) and (7).

Petitioner claims that these requirements represent new burdens, however, because they prevent cable operators from forcing broadcast stations onto new "digital" tiers. Pet. 21. But the cable industry has historically provided different tiers of service (see *Turner I*, 512 U.S. at 629); the fact that cable operators now employ digital technology for some of those tiers does not change the First Amendment calculus. The older, analog tiers, moreover, may soon be a thing of the past. The cable industry is moving toward all-digital operations to take advantage of the greater capacity that digital transmission provides. See *C-SPAN* v. *FCC*, 545 F.3d 1051, 1056 (D.C. Cir. 2008). Indeed, petitioner has announced that it will turn off analog service "throughout [its] footprint in the next year or two." Josh Wein, *Cablevision to Phase Out In-Home DVRs for Remote Storage*, Communications Daily, Feb. 26, 2010, at 9-10. There is no reason for this Court to address a transitional argument that could soon become moot as a result of technological developments.

4. Petitioner also seeks review of the question whether the must-carry requirements effect a "*per se* taking" in violation of the Fifth Amendment. Pet. 23-24. That claim lacks merit.

Per se takings should be "easily identified," *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning*

Agency, 535 U.S. 302, 324 (2002), and should "present[] relatively few problems of proof," *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982). Contrary to these admonitions, petitioner's novel and "amorphous" takings claim involves "bits of data over cable bandwidth" without any "physical occupation of [petitioner's] equipment or property." Pet. App. 25a-26a (quoting *id.* at 57a). The court of appeals correctly rejected petitioner's invocation of per se takings doctrine, and its decision does not conflict with that of any other circuit or otherwise warrant this Court's intervention.[4]

As the court of appeals observed, petitioner's takings claim "fits more comfortably" within this Court's "'regulatory taking' analytical framework." Pet. App. 26a (citing *Penn Cent. Trans. Co.* v. *City of N.Y.*, 438 U.S. 104 (1978)). Yet petitioner waived a regulatory-taking claim below by providing "no * * * evidence" in support of it. *Ibid.*; see *id.* at 57a (Commission noting that petitioner had "present[ed] virtually no substantive argu-

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[4] In a footnote (Pet. 24 n.11), petitioner quotes a 1978 Eighth Circuit opinion for the proposition that "a requirement that facilities be built and dedicated without compensation to the federal government (for public use) would be a deprivation forbidden by the Fifth Amendment." *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1058, aff'd on other grounds, 440 U.S. 689 (1979). The Eighth Circuit's analysis does not conflict with the court of appeals' decision in this case because petitioner was not required to build any facilities for WRNN's benefit. See Pet. App. 25a. Petitioner also quotes (Pet. 24 n.11) Judge Williams's dissenting opinion in *Turner Broad. Sys., Inc.* v. *FCC*, 819 F. Supp. 32 (D.D.C. 1993), vacated, 512 U.S. 622 (1994), but Judge Williams did not "reach the contention * * * that those [must-carry] provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment." *Id.* at 67 n.10. Rather, he simply stated that he did not "regard the claim as frivolous." *Ibid.*

ment that requiring carriage of WRNN-DT would constitute a regulatory taking."). The absence of a preserved regulatory taking claim in this case makes it a poor vehicle for consideration of the question whether the must-carry requirements violate the Fifth Amendment.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Moreover, petitioner fails to explain how it may assert a taking claim in this case given the default rule that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act" for suit in the United States Court of Federal Claims. *Presault* v. *ICC*, 494 U.S. 1, 11 (1990) (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985)); see *Turner Broad.*, 910 F. Supp. at 749-750.